Response to Comments Document

Used Oil Management Standards
Used Oil Clarification Direct Final Rule and Proposal
May 6, 1998 (63 FR 24963)

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
1200 Pennsylvania Avenue, NW (5303W)
Washington, DC 20460

February 2003

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Introduction

On May 6, 1998, EPA issued a Direct Final Rule and Proposal regarding clarifications to the Used Oil Management Standards (63 FR 24963). The Agency received ten comment letters on this rulemaking. Four of these comment letters were adverse, so the Agency removed the three amendments that received adverse comment on July 14, 1998 (63 FR 37780). The following is each individual comment and the Agency's response.

Comments to the Amendment Related to the Applicability of the Used Oil Management Standards to PCB Contaminated Used Oil (40 CFR 279.10(i))

Comment A-1 **Safety-Kleen Corporation (Docket #: CUOP-00002)**

Safety-Kleen Corp. is submitting comments on USEPA's May 6, 1998 direct final rule regarding the "Applicability of the Used Oil Management Standards to PCB Contaminated Used Oil" (63 FR 24963). These comments are required following our submittal of a Notice of Intent to Submit Adverse Comments made on May 20, 1998 regarding the same subject.

Safety-Kleen is the largest recycler of industrial fluids and is also the largest recycler of used oil in the United States. The Company recycles used oil primarily via re-refining, but also blends significant quantities as used oil fuels burned for energy recovery. As part of these activities, we have experienced the need to apply both the RCRA Used Oil Management Standards at 40 CFR 279 and the TSCA PCB regulations at 40 CFR 761.

We applaud the Agency's efforts to ensure that the applicability of both sets of regulations are clear and well understood by the regulated community. However, with regard to the discussion on the applicability of the §279 and §761 regulations to used oils contaminated with PCBs, we feel that additional clarification is required to be added to the regulatory text and preamble to ensure that certain materials are not improperly managed. We believe that the intent of what was proposed in the direct final rule was correct, but that the specific wording did not fully support that intent.

Clarify Regulation of Recycled Used Oils Known to Contain Diluted PCBs

The proposed changes to 279.10(i) do not adequately include a reference as to how the regulations deal with used oil that is known to contain or have been diluted from material at a higher regulatory threshold, i.e., 2 or 50 ppm. Used oil that contains, or is known to have been diluted from 50 ppm or greater material is subject to regulation under the TSCA 40 CFR 761 rules as a PCB waste and not under the RCRA 40 CFR 279 rules. Likewise, used oil that is less than 2 ppm PCBs, but is known to have been diluted from 2 to 49 ppm material is to be regulated under both Parts 279 and 761.

Take for example the situation of used oil containing 35 ppm PCBs, but is known to contain or

have been diluted from 50 ppm or greater. Due to the TSCA anti-dilution rule at 40 CFR 761.1(b), this used oil is subject to the TSCA disposal regulations. However, the proposed wording at 40 CFR 279.10(i) seems to indicate that if the used oil is less than 50 ppm, regardless of whether it has been diluted or not, the oil is subject to the 40 CFR 279 standards. The 40 CFR 279 citations may impose additional burdens which are not applicable when managed as a TSCA PCB waste.

The following modification to the proposed 40 CFR 279.10(i) is suggested to clarify this issue, with the underlining and strike-throughs indicating suggested revisions:

> **§ 279.10 Applicability.**
> *********
>
> (i) *Used oil containing PCBs.* Used oil containing PCBs (as defined at 40 CFR 761.3) at any concentration less than 50 ppm and not known to be diluted from or contain 50 ppm or greater material, is subject to the requirements of this part. ~~Used oil subject to the requirements of this Part may also be subject to the prohibitions and requirements found at 40 CFR part 761, including § 761.20(d) and (e).~~ Used oil containing PCBs at concentrations of 50 ppm or greater, or known to be diluted from or contain PCBs of 50 ppm or greater, is not subject to the requirements of this part, but is subject to regulation under 40 CFR part 761. Used oil containing PCBs at concentrations of 2 to 49 ppm, or known to be diluted from or contain PCBs of 2 to 49 ppm, or of unknown PCB concentration are subject to both § 279 and § 761, including § 761.20(d) and (e).

Clarify the Preamble with Regard to Dilution of PCBs

Similar changes are also needed to the preamble section of this rule dealing with PCB contamination of used oil. In general, whenever a reference is made to a regulatory threshold (i.e., 2 ppm or 50 ppm), a phrase should be added to also reference the dilution issue. The second paragraph after the preamble's Table 1 confirms this position, but we believe that it is necessary to reiterate the anti-dilution statement at each reference to ensure that others do not inappropriately interpret specific citations as allowing dilution. The underscored changes below are suggested to make the preamble clear that dilution from above a regulatory threshold (50 ppm or 2 ppm of PCBs) continues to make the used oil subject to the higher level of regulation, and that used oil that has been subject to dilution from 50 ppm or greater is not regulated by RCRA. These clarifications will ensure that all regulated parties operate under the same rules and interpretations.

The following section shows the applicable section of the May 6 preamble with suggested additions and clarifications underlined, and suggested deletions lined-out:

> **III. Regulatory Amendments**
> **A. Applicability of the Used Oil Management Standards to PCB Contaminated Used Oil**
>
> Today's rule amends 40 CFR 279.10(i) to clarify the applicability of the used oil

management standards of 40 CFR part 279 to used oil containing PCBs. The revised language reflects EPA's intent that used oil that contains less than 50 ppm of PCBs and is not known to have been diluted from 50 ppm or greater is subject to regulation under the used oil management standards. Used oil that contains 50 ppm or greater of PCBs or is known to have been diluted from 50 ppm or greater is not subject to regulation under the used oil management standards, because the TSCA regulations at 40 CFR part 761 provide comprehensive management of such used oil.

Table 1 shows the applicability of the RCRA and TSCA regulations as they pertain to used oil containing PCBs that is to be burned for energy recovery. Used oil that contains PCBs in the range of 2 ppm and greater and less than 50 ppm, or is known to contain 2-49 ppm material, that is burned for energy recovery is regulated by both the TSCA regulations at 40 CFR 761.20(e) and the used oil management standards at 40 CFR part 279. Please note, under the TSCA regulations at 40 CFR 761.20(e)(2), used oil that is to be burned for energy recovery is presumed to contain 2 ppm or greater of PCBs unless shown otherwise by testing or other information. Used oil that is to be burned for energy recovery and has been shown to contain less than 2 ppm PCBs and has not been diluted from greater than 2 ppm, is not regulated under TSCA and is solely regulated under RCRA.

TABLE 1.-REGULATION OF USED OIL CONTAINING PCBS THAT IS TO BE BURNED FOR ENERGY RECOVERY UNDER 40 CFR PART 279 OF RCRA AND 40 CFR PART 761 OF TSCA

Range of actual or known to be diluted from PCB contamination levels in used oil (ppm)	Does RCRA regulate this used oil if it is to be burned for energy recovery?	Does TSCA regulate this used oil if it is to be burned for energy recovery?
Demonstrated to contain less than 2 and not diluted from higher concentrations	Yes	No. *
2 to less than 50	Yes	Yes.
50 and greater	No	Yes.

* Used oil that is to be burned for energy recovery is presumed to contain 2 ppm or greater of PCBs unless shown otherwise by testing or other information.

Used oil containing less than 50 ppm PCBs that is recycled other than being burned for energy recovery is not generally subject to the TSCA requirements. See 40 CFR 761.3 (definition of excluded PCB products); 761.20(a)(1); and 761.20(c). However, 40 CFR 761.20(d) prohibits the use of used oil that contains any detectable concentration of PCBs as a sealant, coating, or dust control agent. This prohibition specifically includes road oiling and general dust control. Use of used oil as a dust suppressant is prohibited under

RCRA except in a state that has received authorization from EPA to allow use of used oil as a dust suppressant. Currently no states have received such authorization. In the event that a state were authorized to use used oil as a dust suppressant pursuant to 40 CFR 279.82, the prohibition in 40 CFR 761.20(d) would still apply.

Used oil that contains PCBs may not be diluted to avoid a particular PCB regulation unless otherwise specifically provided. ~~obtain PCB concentrations less than 50 ppm.~~ See 40 CFR 761.1(b). PCB-containing used oils that have been diluted so that their concentrations are less than 50 ppm are still subject to regulation under TSCA as used oil that contains PCB concentrations of 50 ppm or greater. These diluted used oils are subject to comprehensive management under TSCA and, therefore, are not regulated under the RCRA used oil management standards. The same is also true for used oils diluted from 2 to 49 ppm down to less than 2 ppm. These diluted oils remain defined as "excluded PCB products" and are subject to 40 CFR 761, including § 761.1(f)(4), and 761.20(d) and (e). If dilution is known to have occurred in this case, the used oil is managed under both RCRA and TSCA regulations.

RCRA's used oil management standards have historically applied to used oil containing less than 50 ppm PCBs and not to used oil containing concentrations of 50 ppm or greater. Prior to the promulgation of Part 279 in September 1992, the used oil management standards applied to used oil that contained less than 50 ppm PCBs pursuant to 40 CFR Part 266, subpart E. The preamble to the September 1992 rule that recodified the provisions from the old Part 266 clearly indicates EPA's intent not to regulate PCB-contaminated used oil at levels of 50 ppm and greater under the RCRA used oil management standards (see 57 FR 41566, 41569, 41583; September 10, 1992), but the text of the rule did not reference the 50 ppm standard. Instead, the regulatory text at 40 CFR 279.10(i) purported to exclude from the used oil management standards those PCB-contaminated used oils already "regulated under" the TSCA PCB regulations at 40 CFR Part 761, which as explained above is a potentially broader universe of material. Because the September 10, 1992 RCRA rule excluded PCB-contaminated used oil already "regulated under" the TSCA regulations, it could have been interpreted as excluding used oil containing PCBs at less than 50 ppm from the RCRA used oil management standards.

The May 3, 1993 RCRA rule (58 FR 26420) sought to clarify that the Part 279 standards apply to used oils containing less than 50 ppm PCBs, but did so in a manner that inadvertently created the impression that the used oil management standards also applied to PCB-contaminated used oils at levels of 50 ppm and greater. Today's rule clarifies the scope of the RCRA used oil management standards as EPA has consistently interpreted them.

We believe that the above underscored changes are consistent with the intent and manner in which EPA has managed PCB contamination issues.

Response

The Agency agrees with Safety-Kleen that used oil that contains polychlorinated biphenyls (PCBs) may not be diluted to avoid a particular PCB regulation unless otherwise specifically provided by the regulations. This is specifically addressed by the PCB dilution prohibition in the Toxic Substances Control Act (TSCA) PCB regulations at 40 CFR 761.1(b)(5). As a result of this dilution prohibition, if used oil that is known to contain PCB concentrations of greater than or equal to 50 ppm when generated is diluted to less than 50 ppm, the diluted mixture must be managed as used oil that contains PCB concentrations of 50 ppm or greater. The same is true for used oil that is known to contain PCB concentrations of 2 ppm or greater, but less than 50 ppm; if this used oil is diluted to less than 2 ppm PCBs, the diluted mixture must be managed as used oil that contains concentrations of PCBs of 2 ppm or greater. This issue is also discussed in the June 29, 1998 Disposal of PCBs final rule (63 FR 35384 at 35390). The Agency is revising the regulatory text and the preamble discussion of the final rule in response to this comment.

Comment A-2 **Utility Solid Waste Activities Group, et al (Docket #: CUOP-00003)**

USWAG strongly supports EPA's clarification that used oil containing 50 ppm PCBs or greater is not subject to RCRA's used oil management standards (under 40 C.F.R. Part 279) because such used oil is comprehensively regulated under TSCA's PCB regulations. See 63 Fed. Reg. at 24965, 24969 (amending 40 C.F.R. § 279.10(i)). In particular, EPA made clear in the proposed technical correction that

- used oil containing PCBs at concentrations of 50 ppm or greater is not subject to RCRA's used oil management standards;
- used oil containing PCBs at any concentration less than 50 ppm is subject to RCRA's used oil management standards; and
- used oil containing PCBs at concentrations of between 2 and 49 ppm PCBs that is burned for energy recovery may be subject to TSCA's administrative standards for burning used oil (in addition to RCRA's used oil management standards).

Id. at 24965

This clarification was necessary because EPA inadvertently altered the scope of the pre-existing regulatory language at 40 C.F.R. § 279.10(i) when it issued its first series of used oil technical amendments in 1993 (see 58 Fed. Reg. 26420). The earlier regulatory language in § 279.10(i) unambiguously excluded used oil containing PCBs at 50 ppm or greater from RCRA's used oil program. USWAG brought suit challenging the 1993 technical amendments on grounds that EPA had inappropriately altered the scope of this pre-existing regulation. See EEI, et al. v. EPA, No. 93-1474. The parties ultimately entered into a Settlement Agreement under which EPA agreed to amend the rules re-affirming the full scope of the exclusion. See Settlement Agreement

in EEI v. EPA, filed on August 6, 1996

Therefore, EPA's May 6, 1998 proposed technical correction reaffirming the scope of the pre-existing exclusion from the RCRA used oil program for used oil containing greater than 50 ppm PCBs was required pursuant to the Settlement Agreement in the above-referenced case. The technical correction appropriately clarifies the applicability of TSCA's PCB rules and RCRA's used oils, respectively, to used oil. This clarification should become effective on July 6, 1998 as contemplated by EPA in the accompanying direct final rule (63 Fed. Reg. 24963) because it simply reaffirms the intent and scope of pre-existing regulations.

Response

The Agency acknowledges the Utility Solid Waste Activities Group's support of the proposed amendment.

Comment A-3 **Illinois Environmental Protection Agency (Docket #: CUOP-00006)**

The Illinois Environmental Protection Agency has reviewed the above-referenced document regarding "Recycled Used Oil Management Standards" and wishes to offer the following comments on the proposed changes:

Please refer to FR vol. 63, No. 87, pages 25006-25010 and pages 24963-24969 regarding the "Applicability of the Used Oil Management Standards to PCB Contaminated Used Oil". The discussion or regulations are unclear regarding the relationship between TSCA and RCRA. As a result, we have the following comments regarding these regulations:

a. A facility manages on-spec used oil, but the facility or generator does not conduct a PCB analysis to determine the levels of PCB contained within the used oil. It is not clear if the used oil is presumed to contain quantifiable levels of PCB's (in the range of 2 ppm to 49 ppm, see 40 CFR 761.20(e)(2)), thereby requiring the marketer to comply with 40 CFR 761.20(e)(1).

b. It is not clear if the marketer must test the blended fuel or the shipments of used oil from each generator which were used to make the blended fuel to comply with the TSCA regulations and to determine the levels of quantifiable PCB.

c. If a facility manages on-spec used oil and does not conduct a PCB analysis prior to fuel blending, it is not clear if the used oil prior to blending is presumed to contain quantifiable levels of PCB's the range of 2 ppm to 49 ppm thus requiring the blended fuel to be managed in accordance with 40 CFR 761.20(e)(1).

d. We do not believe a facility that manages on-spec used oil and has knowledge beforehand that the oil contains quantifiable levels of PCB's should be allowed to blend that used oil with other on-spec used oil not containing quantifiable levels of PCB's to a level below quantifiable and thus be allowed to manage it as used oil containing non-quantifiable levels of PCB's.

e. A marketer discovers after blending that some of the used oil included in the fuel contains quantifiable levels of PCB's, it is not clear how the resulting blended fuel must be handled if the analysis of the blended fuel for PCB's is below quantifiable levels.

From our discussions with the regional headquarters and the RCRA and TSCA Hotlines, it is apparent that the question "How to manage used oil containing quantifiable levels or presumed to contain quantifiable levels of PCB's?" has not been fully thought out. From 40 CFR 761.1 applicability Section b, the regulations state that you cannot dilute to exempt the waste from regulation. Ultimately, the questions, "When has dilution occurred, at the generating site, at the transporter's facility when a transporter bulks his load or when the marketer blends the used oil into a fuel?" and "How does one determine that dilution has occurred?" must be answered.

Response

These questions and comments from the Illinois Environmental Protection Agency are directed to the TSCA program's implementation of 40 CFR Part 761. They do not specifically address the proposed amendment to the RCRA Used Oil Management Standards. However, to clarify these regulations for Illinois Environmental Protection Agency and other readers, EPA is providing the following responses to the corresponding lettered questions in the comment:

a. In this scenario, the facility must presume the used oil contains quantifiable levels of PCBs. See §761.20(e)(2), which states: "Used oil to be burned for energy recovery is presumed to contain quantifiable levels (2 ppm) of PCB unless the marketer obtains analyses (testing) or other information that the used oil fuel does not contain quantifiable levels of PCBs." Under the TSCA PCB regulatory program, used oil containing PCBs at a concentration of 50 ppm or greater cannot be burned or diluted for energy recovery purposes. Therefore, marketers must also take appropriate measures to ensure that the used oil contains PCBs at < 50 ppm before distributing the used oil in commerce.

b. Either method may be acceptable in appropriate circumstances. According to §761.20(e)(2)(ii), "testing to determine the PCB concentration in used oil may be conducted on individual samples, or in accordance with the testing procedures described in §761.60(g)(2). However, for purposes of this part, if any PCBs at a concentration of 50 ppm or greater have been added to the container or equipment, then the total container contents must be considered as having a PCB concentration of 50 ppm or greater for purposes of complying with the disposal requirements of this part." The procedures in §761.60(g)(2) state that waste oil from more than one source may be collected in a common container, provided that no other chemical substances or mixtures, such as non-waste oils, or PCB-containing used oils known to have a PCB concentration of 50 ppm or greater are added to the container. Representative samples may then be drawn from the common container to determine the PCB concentration for purposes of compliance with the regulations.

c. As discussed above in answer to comment "a.", used oil of unknown PCB concentration must be presumed to contain ≥ 2 ppm, until the marketer determines the actual concentration. Assuming only used oils presumed to contain quantifiable levels are

batched in a common container, the batched used oil in the common container is also presumed to contain quantifiable levels, unless and until analyzed to determine its actual PCB concentration.

d. EPA agrees. If the PCB concentration of used oil is known, then the used oil must be handled in accordance with its concentration. No person may avoid a regulatory provision specifying a PCB concentration by diluting the PCBs, unless otherwise specifically provided [§761.1(b)(5)]. As no specific provision in the regulation is made for this dilution scenario, once a used oil has been determined by testing or beforehand knowledge, it must be handled in accordance with that concentration. If used oil known to contain quantifiable levels is blended with used oil containing < 2 ppm PCBs, then the whole blended batch must be treated as if it contains quantifiable levels, even if the blended batch is subsequently tested and found to contain < 2 ppm PCBs. Note that the batch testing provision of §761.20(e)(2)(ii) and §761.60(g)(2) apply only to used oil of unknown PCB concentration that is presumed to contain quantifiable levels of PCBs (i.e., 2 ppm or greater***)*** until tested.

e. For purposes of the regulations, this is the same situation as in comment "d.". If the marketer knows that used oil added to the batch contained quantifiable levels of PCBs (i.e., 2 ppm or greater), then the whole batch is regulated as if it contains quantifiable levels, regardless of the actual diluted PCB concentration in that batch. If the marketer learns that some of the batched used oil contained concentrations of 50 ppm or greater PCBs, then the whole batch must be handled as containing 50 ppm or greater PCBs and cannot be burned for energy recovery.

Comment A-4 **Valvoline**
(Docket #: CUOP-00007)

Although Valvoline fully supports the adoption of each of the four separate clarifications and corrections, our comments relate primarily to the issue of the applicability of the used oil management standards to PCB contaminated used oil.

As noted in the preamble, there has been considerable confusion within the industry regarding which management standards applied to used oil containing detectable levels of PCBs, particularly material containing greater than 2 ppm but less than 50 ppm PCBs. We applaud the Agency's unambiguous statement that used oil containing PCBs is effectively regulated under a three tiered scheme:

1. Used oil fuel containing less than 2 ppm PCBs and otherwise meeting the requirements of Part 279.11 is "specification" used oil fuel and no longer subject to regulation.

2. Used oil fuel containing greater than 2 ppm but less than 50 ppm PCBs is regulated, subject to the specific limitations of Part 761.20(e), as "off-specification" used oil fuel under Part 279.

3. Used oil fuel containing 50 ppm or greater is regulated under Part 761.

The elimination of this confusion will further encourage the responsible, cost effective recycling of used oil.

Response

The Agency acknowledges Valvoline's support of the proposed amendment, however the Agency disagrees with Valvoline's interpretation of the rules governing the management of PCB-contaminated used oil. Specifically, Valvoline's comment suggests that the presence of polychlorinated biphenyls (PCBs) in used oil is one of the criteria for determining whether a used oil fuel meets the fuel specification standard such that it may be burned for energy recovery without further regulation under the Resource Conservation and Recovery Act (RCRA). The presence of PCBs in used oil is not one of the criteria under the RCRA used oil specification standard. However, used oil that contains PCBs is subject to requirements under the Toxic Substances Control Act (TSCA). In that respect, TSCA requirements for the marketing and burning for energy recovery of used oil that contains quantifiable (2 ppm) quantities of PCBs less than 50 parts per million (ppm) incorporate certain RCRA Part 279 "off-specification" used oil requirements *by reference*.

RCRA Requirements

The RCRA used oil specification criteria are set forth at 40 CFR 279.11. The specification criteria establish which used oil fuels may be burned in nonindustrial burners without regulation under RCRA. The used oil fuel specification sets maximum allowable limits for arsenic, cadmium, chromium, lead, and total halogens, as well as a minimum flash point. Although the PCB regulations promulgated pursuant to TSCA are referenced in a note to Table 1 in § 279.11, the presence of PCBs in used oil is not one of the criteria for determining whether used oil that is to be burned for energy recovery meets the fuel specification for purposes of RCRA regulation.

Used oil that is to be burned for energy recovery and that meets the RCRA used oil fuel specifications of § 279.11 ("on-specification" used oil) is not regulated under the authority of Part 279 provided that: (1) certain conditions for used oil fuel marketers are met, and (2) so long as the used oil is not mixed or contaminated with hazardous waste. (Applicable on-specification used oil fuel marketer requirements can be found at §§ 279.72, 279.73, and 279.74(b).) This is the case, notwithstanding that a used oil fuel may contain PCBs. Although the RCRA regulations do not identify the presence of PCBs in used oil as relevant to the determination of whether the used oil is on- or off-specification, the presence of PCBs in used oil is relevant for determining the applicability of the TSCA regulations for the burning of used oil.

TSCA Requirements

The TSCA rules (specifically, 40 CFR § 761.20(e)(2)) establish a presumption that quantifiable (2 ppm) quantities of PCBs are present in used oils to be burned for energy recovery. The presumption can be overcome if a marketer determines through testing or other specified procedures that the used oil fuel does not contain quantifiable levels (2 ppm) of PCBs. TSCA rules found at 40 CFR § 761.20(a), also prohibit burning for energy recovery of PCB-containing

used oils at concentrations of 50 ppm and greater. In addition, § 761.1(b)(5) prohibits dilution to attain PCB concentrations either below 50 ppm or below 2 ppm.

TSCA regulations establish requirements for the marketing and burning for energy recovery of used oils containing quantifiable (2 ppm) quantities of PCBs at concentrations less than 50 ppm (40 CFR § 761.20(e)). Some of these requirements are incorporations by reference of Part 279 requirements for the marketing and burning for energy recovery of off-specification used oil. Therefore, by operation of the TSCA rules, used oil that is on-specification under the RCRA rules may nevertheless be subject to certain requirements specified in the RCRA rules for off-specification used oil.

Specifically with respect to used oil burners that burn used oil that contains PCB concentrations less than 50 ppm, the TSCA rules reference the RCRA regulatory provisions of Part 279 Subpart G, including restrictions on burning, notification requirements, tracking requirements, and certification requirements. For used oil marketers that market used oil that contains PCB concentrations less than 50 ppm, the TSCA rules, with limited exceptions, restrict marketing to qualified incinerators, to marketers who market off-specification used oils, and to off-specification burners as defined in the RCRA Part 279 regulations. The TSCA rules also reference the RCRA regulatory provisions for marketers in Part 279 Subpart H, including record retention, notification, tracking, and certification. The fact that the TSCA rules incorporate by reference these RCRA standards does not change the regulatory status of that used oil under RCRA; i.e., that on-specification, PCB-containing used oil is regulated under RCRA authority or that such used oil is off-specification pursuant to Part 279.

Comments to the Amendment Related to Mixtures of CESQG Wastes and Used Oil

Comment B-1 **Utility Solid Waste Activities Group, et al (Docket #: CUOP-00003)**

USWAG supports the proposed correction (and accompanying correction in the direct final rule) that mixtures of conditionally exempt small quantity generator ("CESQG") wastes and used oil are regulated as used oil under RCRA's used oil management standards. 63 Fed. Reg. at 25008. While the used oil regulations already set forth this principle at 40 C.F.R. § 279.10(b)(3), there exists some potentially contradictory language within the CESQG rule under 40 C.F.R.§ 261.5. See 63 Fed. Reg. at 24967. Therefore, EPA has appropriately proposed to amend the CESQG rule to conform to the CESQG/used oil rule set forth in the used oil management standards (i.e., that mixtures of CESQG hazardous waste and used oil are regulated as used oil under RCRA's used oil management standards). Like the corrections discussed above, this correction simply reaffirms EPA's intent with regard to how the used oil rules should be implemented and thus should become effective on July 6,1998 as contemplated in the direct final rule.

Response

The Agency acknowledges the Utility Solid Waste Activities Group’s support of the proposed amendment.

Comment B-2 **National Automobile Dealers Association (NADA)**
(Docket #: CUOP-00005)

...non-withstanding the fact that NADA advises its members (approximately half of whom are estimated to be conditionally exempt small quantity generators (CESQG's)) not to intentionally mix hazardous wastes into their used oil, NADA fully supports and agrees with EPA's clarification that mixtures of CESQG wastes and used oil should be subject to the used oil management standards, irrespective of how the mixture is to be recycled.

Response

The Agency acknowledges the National Automobile Dealers Association's (NADA) support of the proposed amendment. The Agency agrees with the NADA that mixtures of conditionally exempt small quantity generator wastes and used oil should be subject to the used oil management standards, irrespective of how the mixture is to be recycled.

Comment B-3 **National Oil Recyclers Association**
(Docket #: CUOP-00008)

NORA agrees with the common sense approach that EPA has taken in harmonizing the conditionally exempt small quantity generator provision, 40 CFR §261.5(j), with the Part 279 used oil management standards. While this revision is needed and should be adopted, NORA also urges EPA to consider using the final rule to provide a clarification of the regulatory status of mixtures of CESQG wastes and used oil. This would be particularly useful in the context of the rebuttable presumption. As the Agency is aware, there is no chemical or physical difference between a molecule of a chlorinated solvent waste generated by a large quantity generator and a molecule of the same type of waste solvent generated by a CESQG. Nonetheless, the large quantity generator waste is regulated as hazardous while the CESQG waste is not.

In a typical scenario, a used oil transporter collects used oil mixed with hazardous wastes from different types of generators, including CESQGs, all of which are mixed together in his tank truck during the day's collection activities. (It is simply not practical for a transporter on a used oil "milk run" to segregate different categories of used oil generators.) The used oil in the tank truck is tested and shows 1005 parts per million. Can the presumption of hazardousness be rebutted by demonstrating that the CESQG wastes, if subtracted from the mixture, would bring the total halogen level below 1000 ppm? This scenario is at the heart of the regulatory compliance dilemma that confronts most used oil transporters and processors and it should be squarely addressed by EPA.

NORA is not aware of any interpretive letter or guidance document which sheds any light on this particular issue. Because it is a recurring question that arises in every part of the country, NORA suggests that EPA take advantage of the opportunity provided by this rulemaking to clarify the

Agency's policy. For the record, NORA believes that the "subtraction" approach is entirely consistent with the purpose of the rebuttable presumption as well as the CESQG provisions. Obviously, the burden of proof remains with the entity attempting to rebut the presumption. However, there is no reason why a "mathematical proof" should be automatically rejected. We urge the Agency to address this issue in the preamble to the final rule.

Response

The Agency acknowledges the National Oil Recyclers Association's (NORA) support of the proposed amendment. The Agency disagrees with NORA's proposal that a "mathematical proof" can be developed to determine the regulatory status of used oil mixed with hazardous wastes from different types of generators, including CESQGs. Once used oil from different sources is mixed, it is very difficult to determine the initial source and quantity of hazardous waste.

Comment B-4 Pennsylvania Department of Environmental Protection (Docket #: CUOP-00010)

The Pennsylvania Department of Environmental Protection objects to the May 6, 1998, Direct Final Rule's amendment of 40 CFR 261.5(j). This amendment expands 261.5(j) to allow a conditionally exempt small quantity generator (CESQG) generated mixtures of used oil and hazardous waste to be recycled by any means, not just burning for energy recovery, under the used oil regulations. For the reasons stated below, the Department believes that allowing CESQG generated mixtures of used oil and any type of hazardous waste to be recycled by means other than burning is not protective of the public's health, safety or welfare.

1. Allowing mixtures of waste oil and hazardous waste to be managed as used oil runs counter to the prevention efforts being under taken by EPA, as well as this Department. This amendment 261.5(j) allows CESQGs to get rid of their hazardous waste by mixing it with used oil which significantly reduces their cost of disposing of the hazardous waste and their incentive to minimize the amount of hazardous waste being generated.

2. Allowing indiscriminate mixing of hazardous waste from CESQGs with used oil poses a threat to the health and safety of workers who handle used oil. This is because there is nothing to identify the hazardous constituents that have been added to the used oil. As a result, the workers managing these mixtures will not know the dangers due to the additional hazardous constituents in the used oil.

3. Allowing CESQG generated mixtures of any type hazardous waste and used oil to be recycled as used oil does not ensure that the hazardous constituents will be neutralized. Most, if not all, of the used oil reprocessing or re-refining processes do not neutralize hazardous constituents.

1. Allowing CESQG generated mixtures of used oil and any type of hazardous waste

to be managed as used oil makes compliance assurance difficult. In the Department's experience, used oil transporters and processors/re-refiners accept used oil CESQGs along with used oil from all other generators. As a result, when the used oil is mixed with a hazardous waste, it is very difficult to determine whether the mixing was improper or due to a CESQG mixing hazardous waste with its used oil.

Response

The Agency disagrees with Pennsylvania Department of Environmental Protection's (PA DEP's) comment that mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil should only be regulated as used oil if it is to be recycled by burning for energy recovery. This comment opens up the merits of the original rule (§ 270.10(b)(3) and that is not the intent of this amendment. As described in the preamble to the May 6, 1998 direct final rule and proposal, the purpose of this amendment is to harmonize the applicability of 40 CFR Part 261 and Part 279 to mixtures of CESQG wastes and used oil that are to be recycled. Although CESQG wastes are not regulated as hazardous wastes, mixtures of CESQG wastes and used oil that are to be recycled are regulated as used oil under the used oil management standards. The CESQG provision, 40 CFR 261.5(j), that references the applicability of the used oil management standards to mixtures of CESQG wastes and used oil that are to be recycled, appears to limit the applicability of the used oil management standards to mixtures that are to be recycled by burning for energy recovery. Section 261.5(j), therefore, incorrectly suggests that mixtures of CESQG wastes and used oil that are to be recycled in a manner other than by burning for energy recovery, such as by re-refining, would not be subject to the used oil management standards. Indeed, because CESQG wastes are not regulated as hazardous wastes, §261.5(j) would suggest that such mixtures that are re-refined would not be subject to regulation under RCRA Subtitle C or the used oil management standards. Even if EPA were to reopen this issue in this rulemaking and to address the merits of this issue, EPA would come to the same conclusion as it did in the previous rulemakings. EPA is not aware of any reason for distinguishing used oil being burned for energy recovery from used oil being recycled in other ways, and PA DEP did not provide any. Based on its comments, PA DEP seems to imply that CESQG waste is regulated as hazardous waste, when in fact it is NOT generally regulated as hazardous waste. Thus, PA DEP's comment, for example, that this amendment would allow CESQGs to "get rid of their hazardous waste by mixing with used oil" is not correct because CESQG wastes are already not regulated as hazardous waste, and therefore subsequent mixing with used oil would not provide any additional regulatory relief for CESQG wastes. Furthermore, the concerns that PA DEP enumerate, to the extent that they are concerns at all, would appear to apply to mixtures of CESQG wastes and used oil to be recycled by any means, and would not appear to apply uniquely to used oil to be recycled by burning for energy recovery. Again, PA DEP did not provide any reason for distinguishing used oil being burned for energy recovery from used oil being recycled in other ways. Notwithstanding clarification of the federal regulations, a state may regulate mixtures of CESQG waste and used oil more stringently than the federal used oil management program.

Comments to the Amendment Related to Recordkeeping Requirements for Marketers of

On-Specification Used Oil Fuel

Comment C-1 **Williston Basin Interstate Pipeline Company (Docket #: CUOP-00001)**

Williston Basin is a natural gas transportation and storage company operating approximately 3,000 miles of underground natural gas transmission pipeline in Montana, North Dakota, South Dakota, and Wyoming. Williston Basin operates pipeline booster stations in which engines driving compressors, compress the natural gas and discharges it at higher pressures down the pipeline. Williston Basin generates used oil from its compressor engines during periodic oil changes. This used oil is "on-spec" and always has been on-spec - very low in contaminants. Williston Basin is pleased to provide the following comment/clarification.

Currently, EPA is making the following clarification:

> "... the initial marketer of used oil that meets the used oil fuel specification need only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil."

Would you please clarify if Subpart H-"Standards for Used Oil Transporters and Transfer Facilities" is applicable to those processor and re-refiners who transport their on-spec oil or fuel product. (We do not process/re-refine!)

We all know that used oil that is to be burned for energy recovery and that meets the specification provided under 40CFR279.11 is essentially exempt from the regulations. So how about those entities that manage the on-spec used oil. Are we, as a generator consolidating on-spec used oil from satellite locations to a central location regulated as a transporter and subject to the Standards for Used Oil Transporter and Transfer Facilities?

Their remains ambiguity in the regulations. You can see this ambiguity if you review the "Notification of Regulated Waste Activity" booklets published by the U.S. EPA, dated 30NOV93.

> "Persons who transport, process, re-refine, market or burn <u>off</u>-spec used oil for energy recovery are required to notify..." (emphasis added)

Response

The Williston Basin Interstate Pipeline Company does not specifically comment on the proposed amendment regarding recordkeeping requirements for marketers of on-specification used oil. For clarity however, the following discussion addresses the Williston Basin Interstate Pipeline Company's comment.

The person who first claims that their used oil meets the used oil fuel specification is considered a marketer subject to Subpart H (see 40 CFR 279.70(a)(2)). Section 279.70(b)(1) (the description of who is not a marketer) does not apply to generators who first claim that used

oil that is to be burned for energy recovery meets the used oil fuel specification, since they are actually making the specification determination. The Williston Basin Interstate Pipeline Company asked: “Are we, as a generator consolidating on-spec used oil from satellite locations to a central location regulated as a transporter and subject to the Standards for Used Oil Transporter and Transfer facilities?” The answer to this question is dependent on where the used oil is determined to meet the fuel specification. If each shipment of used oil is determined to meet the used oil fuel specification through testing or knowledge before being transported from the “satellite locations”, then the shipment of used oil does not need to be transported by a used oil transporter. Each “satellite location” would be considered to be a used oil marketer subject to the used oil marketer requirements of 40 CFR 279 Subpart H (including notification and recordkeeping). If the used oil generated at the “satellite locations” is shipped to a “central location” where it is determined to meet the used oil fuel specification, then the used oil must be transported by a used oil transporter, the “central location” may be subject to the transfer facility or processor and re-refiner requirements (depending on the storage time prior to making a used oil fuel specification determination), and the “central location” would be subject to the marketer requirements.

Comment C-2 **Utility Solid Waste Activities Group, et al (Docket #: CUOP-00003)**

USWAG also strongly supports the proposed clarification (and accompanying clarification in the direct final rule) that persons who first claim that used oil fuel meets the used oil fuel specification limits at 40 C.F.R. § 279.11 (such persons are defined as "marketers" of used oil fuel) must only keep a record of the shipment of used oil to the first facility to which the marketer delivers the used oil. 63 Fed. Reg. at 24967. We understand that EPA issued this clarification because a certain State(s) had erroneously taken the position that such marketers must keep records of the facility that ultimately burns the used oil for energy recovery. Such an interpretation would create significant compliance problems because in many cases marketers send on-specification used oil to a fuel oil distributor for subsequent distribution to downstream burners. In these circumstances, it would be virtually impossible for the initial marketer of the on-specification used oil to maintain records of the facility that ultimately burns the oil.

In proposing the above clarification, the Agency correctly acknowledged that "[t]he preamble to the November 29, 1985 [used oil] rule . . . clearly describes the agency's intent to only track on-specification used oil that is to be burned for energy recovery one step beyond the initial marketer." 63 Fed. Reg. at 24967, citing 50 Fed. Reg. 49164, 49189. Thus, here too, EPA's May 6,1998 proposed clarification is designed simply to clarify the Agency's pre-existing intent that the person who first claims that used oil meets the specification limits must keep a record of "each shipment of used oil to the facility to which it delivers the used oil." 63 Fed. Reg. at 24969 (emphasis added). Because this clarification reaffirms the Agency's pre-existing intent, USWAG believes that this clarification also should become effective on July 6,1998 as contemplated in the accompanying direct final rule.

Response

The Agency acknowledges the Utility Solid Waste Activities Group’s support of the

proposed amendment.

Comment C-3 State of New Hampshire Department of Environmental Services (Docket #: CUOP-00004)

The existing regulations require the first person who claims that used oil, which is to be burned for energy recovery, meets the fuel specifications under §279.11 to keep a record of each shipment of used oil to an on-specification used oil burner. The proposed change requires such marketers to only keep a record of each shipment of used oil to the facility to which it delivers the used oil, which may or may not be the end user (i.e. used oil burner). If adopted, this amendment will not only impact the initial used oil fuel marketer, but will have ramifications on how §279.11 "Used oil specifications" is interpreted. Since the establishment of the used oil management standards under 40 CFR Part 279 on September 10, 1992, the states, EPA Regions and EPA Headquarters have debated the extent to which specification used oil is regulated. Section 279.11 reads "Once used oil that is to be burned for energy recovery has been shown not to exceed any specification and the person making that showing complies with sections 279.72, 279.73 and 279.74(b), the used oil is no longer subject to this part." This provision makes the requirements of §279.74(b) particularly important because it stipulates how far specification used oil fuel is to be tracked; and, in effect, "regulated". Section 279.74(b) has been interpreted, by some regulators, to mean that specification used oil fuel is regulated under Part 279 up until the point it reaches the used oil burner (i.e. tracked to the point of recycling). The 5/6/98 proposed amendment implies that once used oil which is intended to be burned for energy recovery has been declared to meet the specifications, then it is no longer tracked beyond the point of delivery by the initial used oil fuel marketer (i.e. not tracked to the point of recycling), and thereby not further subject to any of the management requirements set forth in Part 279.

If this is EPA's intent, consider the effect in the following situations:

- A used oil transporter, acting as an initial used oil fuel marketer, makes a claim that the used oil which is collected meets the fuel specifications. The transporter then delivers the oil to a used oil processor for further filtering and blending prior to being sold as a fuel oil. The used oil processor would not be subject to any of the Part 279 management standards for processors since the processor is dealing with specification used oil fuel only.

- A generator, acting as an initial used oil fuel marketer, determines that his/her used oil meets the specifications. This oil is then delivered to a business across town to be burned in a used oil heater. Arguably, no transporter EPA Identification number is required, nor will the transporter requirements of §279.43 apply since the used oil drops out of regulation under §279.11.

- A used oil fuel marketer makes a claim that a batch of used oil meets the specifications. After delivering this oil to the next party and meeting the tracking requirements of §279.74, the used oil may be managed as a product with no further regulatory controls. This means that there is also no assurance that the

used oil ever makes it to a burner and is recycled in this manner, since the next party could choose to manage the specification use oil in some other unauthorized manner (i.e. road oiling). The point is, not tracking used oil fuel to the end user, opens the door for potential mismanagement.

Another result of allowing specification used oil fuel to drop out of the regulations is that it discourages the re-refinement of used oil which is the preferred environmental solution. With fewer environmental regulatory controls placed on-specification used oil when it is sent for burning, it will cost less to manage used oil as a fuel than to ship it to a re-refiner where it will be tracked and regulated fully until it has been re-refined into a usable product.

EPA explains the rationale for this proposed change in the Final Rule Section of the 5/6/98 Federal Register notice. The Agency explains that it was EPA's intent in the November, 1985 rules to only track on-specification used oil fuel one step beyond the initial marketer and implies that when the rules were recodified in September, 1992 it was an error that required the marketer to keep a record of each shipment to an on-specification used oil burner. The NHDES acknowledges that certain portions of 40 CFR Part 266, Subpart E "Used Oil Burned for Energy Recovery" were merely recodified in Part 279; however, we also believe that due to the significant changes adopted in Part 279, one cannot always make a direct correlation between the two sets of rules.

In 1985, 40 CFR Part 266, Subpart E only regulated the *burning* of used oil and, other than record keeping and analysis, there were no management standards in place for generators, collectors, processors, transporters or burners. Section 266.40(e) stated that "Used oil fuel that meets the specification is subject only to the analysis and record keeping requirements under 266.43(b)(1) and (6)." This rule required the marketer to keep a log on each shipment with the name and address of the receiving facility, quantity of used oil fuel delivered, date of shipment or delivery and a cross reference to the documentation supporting the specification claim. When Part 279 was adopted, it regulated all forms of used oil recycling (not just the act of burning) and further added management requirements on the handling of used oil. Therefore, the Part 266 standards can not be interpreted exactly as they were in 1985 since Part 279 established management standards for all stages in the used oil recycling process.

The preamble to the Federal Register for the 9/10/92 rules (41577) makes it clear that EPA's intent was to have regulations that would protect the public against the potential hazards associated with the mismanagement of used oil. "EPA believes that, irrespective of whether used oils exhibit a characteristic of hazardous waste, used oils can pose some threat to human health and the environment ....Therefore, it is important that used oils are handled in a safe manner from the point of generation until recycling, reuse, or disposal." And, "The management standards adopted today are designed to address the potential hazards associated with improper storage and handling of used oil by establishing minimal requirements applicable to used oil generators, transporters, used oil processors, and re-refiners, and off-specification used oil burners." Note that the only entity not listed are specification used oil burners. We believe the hazards associated with specification used oil will be the same whether or not the used oil is being handled for burning or for re-refinement. For this reason it does not seem logical to drop specification used oils from the entire Part 279 management system simply because there is a *claim* that the used oil is to be

burned for energy recovery.

In conclusion, the NHDES does not object in concept with the record keeping requirements being proposed for initial used oil marketers, but has concerns that this change will further support a claim that specification used oil fuel is no longer subject to the management requirements that have been established under Part 279 to protect the public health and the environment. Therefore, NHDES is objecting to the proposed changes to 40 CFR 279.74(b), unless these changes are accompanied by additional amendments that will ensure that all used oils destined for recycling are subject to basic protective management standards.

Response

The Agency disagrees with the State of New Hampshire Department of Environmental Services (NH DES). NH DES' comment opens up the merits of the original November 29, 1985 rule and that is not the intent of this amendment. The Agency is not reopening the merits of this issue, because the Agency addressed the merits of this issue back in the preamble to the 1985 rule (50 FR 49164 at 49189). The amendment in question does not represent a change in the requirements, but only clarifies the Agency's intent that only the initial marketer of on-specification used oil must keep a record of each shipment of used oil to the facility to which it delivers the used oil. In fact, EPA interprets the existing regulation this way, since it views the phrase "to a used oil burner" as describing the type of shipment, not as delineating the scope of the record-keeping requirement. In the September 23, 1991 supplemental notice of proposed rulemaking (56 FR 48000), EPA did not propose to change the tracking requirements or the management requirements for used oil that meets the used oil fuel specification that were originally promulgated in 1985. In drafting the 1992 rule, EPA only intended to recodify the tracking requirements from the now superseded Part 266. It has always been the Agency's position that used oil that is to be burned for energy recovery that meets the used oil fuel specification is a commodity that will be properly handled like any other fuel. The Agency has always intended that used oil that is to be burned for energy recovery only be regulated under the Used Oil Management Standards until it has been determined to meet the used oil fuel specification. Once it has been determined to meet the fuel specification and the marketer complies with 279.72, 279.73, and 279.74(b), the used oil is no longer regulated by the Used Oil Management Standards. If the used oil is not burned for energy recovery and is recycled by other means or disposed, it is fully regulated as used oil under the Used Oil Management Standards. Even if the Agency were to address the merits of this issue, we would continue to take the position as we are taking in this amendment, because, for the reasons discussed below, the Agency believes that the tracking requirements would provide adequate protection. Specifically, NH DES expressed its concerns over certain resulting effects of the amendment since it would not require tracking and would therefore not impose regulation beyond the point of delivery by the initial used oil fuel marketer who first claims that used oil that is to be burned for energy recovery meets the fuel specification. As stated above, the Agency believes that used oil that is to be burned for energy recovery that meets the used oil fuel specification is a commodity that will be properly handled like any other virgin fuel oil. EPA does not share NH DES' concern, because once the used oil is viewed as a commodity, EPA believes it is no different than any other virgin fuel oil that also is not regulated under Part 279. EPA articulated this view in the preamble to the November 29, 1985 rule. EPA explained that although it considered applying recordkeeping

requirements to all subsequent markets (e.g., distributors) until the used oil fuel is ultimately burned, it decided not to do so. EPA explained that "the used oil fuel poses no greater risk than virgin fuel oil and, once it enters the commercial fuel oil market, should not be regulated differently than virgin fuel oil." 50 FR 49189 (November 29, 1985). NH DES provides its view that the hazards associated with specification used oil would be the same whether or not the used oil were being handled for burning or for re-refinement, for example. Thus, NH DES feels that it does not make sense for EPA to impose tracking (and other Part 279) requirements on used oil destined for re-refining up until it is actually re-refined, while EPA imposes tracking (and other Part 279) requirements on on-specification used oil destined for burning only to the point of delivery by the initial used oil fuel marketer. EPA believes that it is reasonable to impose different tracking (and Part 279) requirements for the two different situations above, because EPA distinguishes on-specification used oil destined for burning as being different from all other used oils. As EPA explained above, on-specification used oil destined for burning is a commodity and should be viewed no differently than virgin fuel oil at the point of delivery by the initial used oil fuel marketer. EPA does not view used oil destined for other purposes as a commodity, analogous to virgin fuel oil, because such used oil would not be used for a similar purpose and in a similar manner as one would use virgin fuel oil. The commenter has provided no new information or arguments that would lead us to change this long-standing position. Notwithstanding this clarification of the federal regulations, a state may regulate used oil more stringently than the federal used oil management program.

Comment C-4 **National Oil Recyclers Association (Docket #: CUOP-00008)**

NORA fully supports the proposed amendment to 40 CFR § 279.74(b) which would clarify that the marketer who first claims that used oil constitutes on-specification used oil fuel need only retain a record of the shipment to the facility receiving the used oil from such marketer. Section 279.74(b) has been read by some state agencies to require the initial marketer to track all shipments including the final shipment to the burner. As EPA has recognized, this interpretation conflicts with the reality of used oil marketing practices. The initial marketer often sells on-spec fuel to a blender who further processes the used oil and sells it in different formulations to other marketers and to end-users (burners). The blender may not know the final destination of the fuel and, in any event, will certainly not provide his customer lists to the initial marketer. In other words, the interpretation made by some state agencies placed a regulatory requirement on the initial marketer which was impossible to fulfill.

Nor is such an interpretation needed to provide adequate controls. Under EPA's proposed clarification the initial marketer remains responsible for assuring that the used oil that he sells meets the specification criteria. All subsequent marketers as well as the end user have both economic and regulatory incentives to maintain the status of the used oil as specification used oil fuel. In the highly unlikely event that a subsequent marketer blends a specification used oil fuel in a way that creates an off-specification product, this marketer cannot legally sell this fuel as on-specification fuel and, in fact, must comply with all applicable rules for managing and marketing off-specification used oil fuel. Thus, EPA's proposed clarification conforms to real-world transactions in the used oil fuel industry but does so without sacrificing any

enforcement safeguards. Accordingly, NORA commends EPA for this worthwhile clarification and urges the Agency to adopt this revision.

Response

The Agency acknowledges the National Oil Recyclers Association's support of the proposed amendment.

General Comments to the May 6, 1998 Direct Final Rule and Proposal

Comment D-1 **National Automobile Dealers Association (NADA)**
(Docket #: CUOP-00005)

NADA generally supports EPA's proposed technical corrections and clarifications on used oil and PCBs, responses to used oil releases in non-authorized states, used oil fuel, and marketer recordkeeping.

Response

The Agency acknowledges the National Automobile Dealers Association's support of the proposed amendments.

Comment D-2 **Pennzoil**
(Docket #: CUOP-00009)

Pennzoil Company appreciates EPA's efforts to maintain used oil in its present status as a non-hazardous waste. We therefore, support the direct final rule of May 6, 1998 and do not have any adverse comments for submission.

Response

The Agency acknowledges Pennzoil's support of the proposed amendments.